79-213

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1979

NO. 79- ———

CHARLES BEN HOWELL, SUING ON BEHALF OF HIMSELF AND ALL OTHER PERSONS SIMILARLY SITUATED AS A CLASS ..... *Petitioners*

VS.

METRO BANK OF DALLAS, ET AL ..... *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NUMBER BELOW: 78-2,856

HOWARD D. PATTISON
105 S. Prairieville
Athens, Texas 75751
(214) 675-8030

Attorney for Petitioners

TREVATHAN PRINTING COMPANY, NEWPORT, ARKANSAS

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The petitioner, Charles Ben Howell, suing on behalf of himself and all other persons similarly situated, as a class, complains of the respondents, Metro Bank of Dallas, a banking corporation and Pan National Corporation, its substantially sole stockholder. Petitioners request the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the judgments and orders entered in that court in its cause number 78-2,856 where petitioners were appellants and the respondents were appellees.[1]

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[1]Unless otherwise indicated, all emphasis has been supplied by petitioners.

OPINION BELOW

Neither the Fifth Circuit nor the District Court filed any opinion or other statement indicating the grounds of decision. Inasmuch as nothing was available to publish, nothing was published. The Appendix hereto contains the District Court's order of dismissal dated August 7, 1978 (P.A.17), the Circuit Court's affirmance order dated March 20, 1979 (P.A.18) and its order denying the petition for rehearing en banc dated April 30, 1979 (P.A.19). The Fifth Circuit rulings are noted in tabular form only at 592 F.2d 1188 and 594 F.2d 863 (5-TX 79).

JURISDICTION

The judgment of the Court of Appeals was dated and entered March 20, 1979 (P.A.18). The Court of Appeals extended the time to petition for rehearing until April 20, 1979. A petition for rehearing was filed on April 17, 1979 and was denied on April 30, 1979 (P.A.19). Mr. Justice Powell has granted an extension of time to file this petition until on or before August 9, 1979 and the petition is being filed within the time limit as extended. The jurisdiction of the Supreme Court is invoked under 28 *USC* §1254(1).

QUESTIONS PRESENTED

QUESTION ONE:

Considering the facts of this case, the large numerical membership of plaintiff class, the substantial aggregate amount of money involved, the novelty, number and complexity of the issue presented, did the Fifth Circuit not deny important rights by affirming on the summary calendar without oral argument and without giving any indication of the basis of the Court's decision?

QUESTION TWO:

Do the statutes relating to Federal Deposit Insurance create an implied right of action for the misapplication or purloinment of a federally insured bank deposit?

QUESTION THREE:

Did the defendant bank set forth any other valid grounds in the Motion for Dismissal which it filed in the District Court?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

18 *USC*, §656: Whoever, being * * * connected in any capacity with any * * * national bank or insured bank, * * * purloins or willfully misapplies * * * any monies, funds, [or] assets * * * *intrusted to the custody or care of such bank* * * * shall be fined * * *.

18 *USC*, §657: Whoever, being * * * connected in any capacity with the * * * Federal Deposit Insurance Corporation * * * or any lending, * * * corporation or association authorized or acting under the laws of the United States * * * purloins or willfully misapplies any monies, funds [or] credits * * * *intrusted to* [*the*] *care* [*of such institution*] shall be fined * * *.

18 *USC*, §1005: Whoever makes any false entry in any book, report, or statement of [any national bank or insured] * * * bank with interest to injure or defraud * * * *any individual person* * * * shall be fined.

18 *USC*, §1006: Whoever, being * * * connected in any capacity with the * * * Federal Deposit Insurance Corporation * * * or any lending * * * corporation or associa-

tion authorized or acting under the laws of the United States * * * with intent to defraud * * * any individual * * * makes any false entry in any book, report or statement of * * * any such institution * * * with intent to defraud * * * [and who] * * * participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any [such] transaction * * * shall be fined.

United States Court of Appeals, Fifth Circuit, Local Rule 18: Whenever the Court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on a separate summary calendar. Cases will be placed on the summary calendar by the Clerk, pursuant to directions from the Court. [See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., Cir, 1970, 431 F.2d 409.] Notice in writing shall be given to the parties or their counsel of the transfer of the case to the summary calendar.

United States Court of Appeals, Fifth Circuit, Local Rule 21: (Note: Italicized portion was added and bracketed portion was deleted by amendment effective October 20, 1978). When the Court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the Court for decision: (1) that a judgment of the District Court is based on findings of fact which are not clearly erroneous, (2) that the evidence in support of a jury verdict is not sufficient, *or* (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; *and the Court also determines that no error of law appears and* [(4) that no error of law appears; and the Court also determines that] an opinion should have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the Court may in its discretion enter either of the following orders: "AFFIRMED. See Local Rule 21," or "ENFORCED. See Local Rule 21."

See N.L.R.B. v. Amalgamated Clothing Workers of America, 5th Cir. 1970, 430 F.2d 966.

STATEMENT OF THE CASE

Proceedings and Disposition Below: The original complaint was filed on July 28, 1977 (R.1). The only pleading ever filed by respondents, "Motion to Dismiss and Strike Pursuant to Rules 12b, 11 and 56, F.R.C.P." was filed on August 18, 1977 (R.10-15). An amended complaint was filed on October 18, 1977 (P.A.1). On August 7, 1978 the District Court dismissed the complaint. The revised order of dismissal recites that respondents have moved upon three grounds:

> (1) "The Complaint fails to state a claim against the Defendant upon which relief can be granted in that Plaintiff's claim is not subject to prosecution as a class action";
>
> (2) "The Court lacks jurisdiction because the amount in controversy is less than $10,000, exclusive of interest and costs";
>
> (3) "The Court lacks jurisdiction over the subject matter of this suit" (R.67).[2]

After these recitals, the order states that respondents' motion "be granted" and that the complaint is "hereby dismissed" lending the inference that the District Court sustained all grounds recited and perhaps, all grounds presented.

No affidavits, depositions or other competent summary judgment proof was offered. No evidentiary hearing was

[2]Actually, the motion sets forth five separately numbered grounds; (4) that the Court should invoke abstention and (5) that the complaint is a sham and without good faith grounds to support it. Respondents have also presented certain argument that appears to be more a "want of merit" contention than a "want of jurisdiction" argument.

held. Respondents never answered to the merits. The District Court did not explicate its ruling either in writing or orally.

Petitioner expressly requested oral argument of the Fifth Circuit, but the Court declined to honor the request. The case was affirmed without argument and without opinion (P.A.18). Thereafter, a petition for rehearing en banc was disposed in similar fashion (P.A.19).

Statement of Facts: The entire case turns upon the sufficiency of the amended complaint. Inasmuch as it is only 13 pages in length, it is more adequate to reproduce it than to attempt to summarize its allegations. A copy of the complaint is in the appendix (P.A.1).

By their complaint, petitioners attack the validity of respondents' hot check charges. It is alleged that these charges amount to as much as $18.00 for a single insufficient check, even when innocently written. Petitioner Howell alleges that within seven business days, respondent bank deducted $108.00 in hot check charges from his account and refused to restore the charges even though he assured respondent that the insufficiency resulted from oversight in mailing a deposit to the wrong bank.

The complaint alleges that respondent bank has an established policy of omitting notice to depositors that checks have been bounced in order to enhance revenues from hot check charges. It is alleged that respondent purposely causes the situation to multiply and feed upon itself to the point where respondent often collects hot check charges upon checks which would have cleared but for respondent's own hot check charges previously imposed.

It is alleged that during the ensuing month after assessing hot check charges, when respondent bank is required to render a statement of account, it encloses slips declaring that the charges levied constitute "the cost of handling a check" which was insufficient whereas in truth and fact, any identifiable direct extra expense of respondent amounts to only a few cents at most.

The practice is alleged to be a scheme to misapply or purloin funds of a depositor from an insured bank. The complaint pleads for return of all hot check charges previously levied and for injunctive relief against future excesses of a similar nature.

As stated above, the case has been disposed without ever receiving an answer running to the merits. 51 cases were cited as authority for petitioners along with a number of texts and statutes. On March 20, 1979, the Fifth Circuit affirmed without opinion. The affirmance order was delivered on a mimeographed form routinely used by the Court for such purposes. The order refers to Fifth Circuit *Local Rule* 18 and the case of *Isbell v. Citizens,* 431 F.2d 409 (5-TX 70), wherein *Local Rule* 18 was instituted (P.A.18).

The order further refers to Fifth Circuit *Local Rule* 21 and the case of NLRB v. Amalgamated, 430 F.2d 966 (5-NLRB 70) wherein *Local Rule* 21 was instituted. A petition for rehearing en banc was filed protesting that this was not a proper case for the application of *Local Rules* 18 & 21 but the petition for rehearing was likewise denied without explanation (P.A.19).

REASONS FOR ALLOWING THE WRIT

QUESTION ONE:

The Supreme Court Should Declare The Constitutional and Procedural Limits Upon The Practice of Deciding Appeals Without Argument or Without Opinion or Without Either of Them.

In *Rochin v. Ca.,* 342 U.S. 165 (52), Mr. Justice Frankfurter discussed the proposition that due process of law includes those procedures and practices that have been uniformly and traditionally followed over the years by quoting from Edmund Burke:

> " 'Your committee do not find any positive law which binds the judges of the courts in Westminister-hall publicly to give a reasoned opinion from the bench, in support of their judgment upon matters that are stated before them. But the course hath prevailed from the oldest times. It hath been so general and so uniform, that it must be considered as the law of the land.' " *Id.* 170-171, *fn.*

How times have changed! Mr. Justice Frankfurter would hardly recognize the present day practice in the Courts of Appeals where droves of cases are now disposed of without argument or without opinion or, in many instances without either argument or opinion. Serious and widespread concern has been expressed, but the practice continues to grow. While we see no question of a constitutional nature as long as the practice is limited to cases of a simple nature and those plainly without merit, the widening use of the practice does raise definite constitutional questions. Even further, serious questions of federal housekeeping are involved. The federal court system has long prided

itself as a model for emulation by the various state systems. But, in the present instance, the federal courts themselves have been the leaders in the movements to deny the ancient right to make a face to face presentation of one's case and further to throw out opinion writing even though many regard an explication of the grounds of decision as a cornerstone of the right of appellate review. If the concept that the litigants have the right of appellate confrontation together with the right to receive an explanation of the appellate court's decision disappears from the American scene; if it becomes established that an opinion may be omitted at will, the credit, or the blame, as one may view the situation, will lie entirely with the federal courts.

The movement is well under way. Petitioners submit that it is time for the Supreme Court to look at the matter. This Court should fix reasonable guidelines and decide what minimum indications the Court of Appeals must give as the basis for their decisions. It is submitted that the present case, containing many serious issues, furnishes a suitable vehicle to explore the no-opinion practice.

THIS WAS NOT A PROPER CASE FOR PROCEDURAL SHORTCUTS

Petitioners respectfully but seriously submit that the Fifth Circuit has not observed its own rules. *Local Rule* 21 plainly and unequivocally provides that the Court may not affirm without opinion unless it affirmatively determines than "an opinion would have *no precedential value*" (Emphasis supplied). While conceding that their viewpoint may not be entirely detached, petitioners and their counsel strongly feel that any such ruling in the present case is unsupportable.

Unlike *Local Rule* 21, the text of *Local Rule* 18 states no criteria for its application. We are unable to envision how or why the Fifth Circuit would establish significantly different criteria for the application of the two rules. In practice, it has not done so. While there have been exceptions, the large bulk of the cases disposed without argument have also been disposed without opinion and vice-versa.

Rule 21 is based upon *NLRB v. Amalgamated,* 430 F.2d 966 (5-NLRB 70). Neither do petitioners believe that the Court below has complied with the mandate contained in that case.

In the present case, there are 10,000 plaintiffs (P.A.2). Plaintiffs sue for the recovery of unlawful and unjustified charges amounting to $3,000,000. At least, these are the uncontroverted allegations of the complaint wherein the District Court dismissed and thereby deprived petitioners of an opportunity to make proof.

Nor does the importance of the case stop with the parties plaintiff. The precedential value thereof would stretch across the entire banking industry. This Court must know that during recent years, banks everywhere have been proliferating and escalating their various "nuisance" charges. Whereas a few years ago, depositors universally received free services in return for the use of their money, bankers have found that the public can be charged for services comprised of retaining the public's money until the return thereof is desired. The fees are collected through the handy expedient of deduction from the deposit on hand. Most often, the money is gone from the depositor's account before he realizes that he has even incurred the charge.

Nationwide, unilaterally exacted charges upon bank

deposits necessarily amount to many millions each year. However, we find not one single case dealing with the authority of banks to unilaterally assess their depositors. If respondents know of any such case, they have not bothered to cite the same. Obviously, a published opinion in this case would have widespread effect. How can it be argued that an opinion as to whether such practice constitutes any violation of federal law would have no precedential value?

The practice of assessing "hot check charges" was unknown in banking circles, perhaps ten years ago. Nowadays, a myriad of banks charge them, but there is no law on the subject. We think that the specific procedures of respondent bank are particularly opprobrious for reasons stated in the Complaint. We think that a charge fifty times the bank's identifiable direct extra cost of processing a returned check to be grossly exorbitant. Dismissal of the Complaint necessarily imports a ruling that these matters are of no federal concern, however nefarious they may be. And yet, it has been ruled that an opinion would have no precedential value.

Similarly, the Fifth Circuit has stated the following test for the omission of oral argument:

> "* * * Those [cases] in which the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case, * * *" *Groendyke v. Davis,* 406 F.2d 1158, 1162 (5-TX 69).

If there is no controlling precedent, how can it be asserted that there can be no substantial question as to outcome? Respondent bank contends that federal courts have no jurisdiction over their activities but respondent is

regulated by the FDIC. The scheme of regulation is extensive. Further, the doctrine of implied remedies is well established. How could it have been asserted that there is no substantial question as to the application of the implied remedies doctrine in the case at bar?

Not only does *Local Rule* 21 require a finding of no precedential value, it further states that an opinion may be omitted only when one of three specific circumstances occurs. Each of those three are manifestly inapplicable. Prior to April, 1978, the proposition "that no error of law appears" was an independent grounds to omit an opinion, or at least apparently so. But, by the latest amendment, the proposition has been made conjunctive (and) rather than distinctive (or). However, the practicalities are that the Court has not taken any notice of the amendment in any published opinion and, as illustrated by the case in hand, the flow of "no opinion" cases continues unabated. The Court, by its conduct, has plainly evidenced that it considers the amendment to be of no moment whatever. Admittedly, the Court has erected strict standards for the application of *Rules* 18 *and* 21. The conclusion is required both from a fair reading of *Amalgamated* and from a fair reading of the sparse number of other reported cases discussing those rules. *Halling v. U. S.*, 440 F.2d 793 (5-GA 71); *Biggs v. U. S.*, 438 F.2d 1180 (5-FL 71); *McLain v. Beto*, 441 F.2d 703 (5-TX 71); *Morris v. Fidelity*, 441 F.2d 1146 (5-LA 71); *U. S. v. Brown*, 441 F.2d 727 (5-TX 71). However the case in hand simply does not fall into the category described, and it is plain that the Court has failed to observe its own strictures.

GUIDELINES AND LIMITATIONS CONCERNING APPELLATE SHORTCUTS SHOULD BE ESTABLISHED AND ENFORCED

Just what reasoning impelled the Fifth Circuit to reject petitioners' case and the within argument out of hand? Obviously, there is no means to divine the Court's thinking. It is impossible to unlock the Court's bosom and discover why petitioners lost their appeal. Wherever litigants and their lawyers believe in the justice of their cause, as the vast majority of them do, a feeling of emptiness, frustration or even outrage is inevitable. In the wake of "no argument" and "no opinion," those who approach the Court with misgivings or suspicion, are certain to go away convinced that the decision was based upon bigotry and bias rather than upon the law.

The viewpoint of the practitioner is amply expressed in *Proceedings Re: Rules and Rule Making,* 79 FRD 471, 489-491 (78).

> "Within eighteen months after Rule 18 was adopted, thirty-eight percent of all cases were being disposed without oral argument. By the end of fiscal 1976, the percentage had risen to fifty-eight percent."

Rules 18 & 21 coupled together were described as a "double knockout blow." It was argued that the Fifth Circuit has resorted to:

> "A certiorari-type discretionary review * * * totally contrary to the traditional and statutory appeal as a matter of right."
>
> "The practice of delivering written opinions is * * * declining and now seems to be omitted in about 34

> percent of decided cases at the Court of Appeals level. Some of the opinions shown as per curiam are actually only summary affirmances.
>
> These trends are disturbing for they may erode the integrity of the law and of the decisional process. The intuitive wisdom of Anglo-American law has insisted upon oral argument and written opinions for very good reason. Judges, who are properly not subject to any other discipline, are made to confront the arguments and to be seen doing so. They are required to explain their result and thus to demonstrate that it is supported by law and not by whim or personal sympathy." Bork, *Dealing With the Overload,* 70 FRD 231, 233 (1976)

Mr. Bork's estimate appears to be conservative. According to a report of the Senate Judiciary Committee dated September 30, 1975, approximately 53% of all cases in the Fifth Circuit were, in the most recently completed fiscal year, disposed without opinion. High percentages were given for several others. *U.S. Sen. Rpt.* 94-404 (1975). The report expresses concern that the procedure if carried too far will undercut fundamental constitutional rights. It is stated that:

> "Our concept of due process imposes limits on the nature and on the extent of permissible shortcuts in the appellate process * * *," *Id.* 25

Minimal due process requires that a decision maker at any level confine itself to the record, to the evidence properly adduced before itself, to the applicable rules of law and to a sound exercise of discretion. Without any written statement from an unseen decision maker, there is no

assurance that these requirements are met. Such an explanation is an important feature of any judicial opinion.

> "Plainly * * * [letting counsel feel that the case has been dealt with carefully and fairly] is one function and no slight one; but surely at our present juncture an equally or even more important office is to *let the winner* (and incidentally, *the loser,* and not at all incidentally, *any member of the bar*) *get some working idea of what did the scoring for the victory.*" Llewellyn, *Common Law Tradition,* 290 (1960). (Emphasis in original.)

Rule 52(a), FRCVP requires findings of fact and conclusions of law in all civil actions tried without a jury, a duty here omitted by the District Court. Plainly, the object is to promote care on the part of trial judges to aid in the process of adjudication and to guide the appellate court on review. The trial court's findings must "afford a clear understanding of the ground upon which the court based its judgment." *Fluor v. Mosher Steel,* 405 F.2d 823, 828 (9-AZ 69). See also *Schneiderman v. U. S.,* 320 U.S. 118, 129-131 (43).

Rule 23(c), FRCRP provides that the defendant may request findings of fact when tried before the bench. The rationale, both civil and criminal, is similar; to require the trial court to analyze the case and articulate the grounds for its judgment. All judges are aware that this process sometimes convinces the court that its original, tentative conclusion was unwarranted.

Courts reviewing administrative determinations are acutely aware of the potential for abuse, the need to insure fairness and the need to facilitate judicial review by requiring statements of fact. In *Goldberg v. Kelly,* 397 U.S. 254 (70), the Court held that minimal due process included a statement of reasons for the decision:

> "Finally the decision maker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced * * *. To demonstrate compliance with this elementary requirement, *the decision maker should state the reasons for his determination and indicate the evidence he relied on,* * * *." *Id.* 271.

The same requirement has been restated with respect to revocation of parole proceedings.

> "Our task is limited to deciding the minimum requirements of due process. They include * * * *a written statement by the fact finders* as to the evidence relied on and the reasons for revoking parole." *Morrissey v. Brewer,* 408 U.S. 471, 488-489 (70).

Decision by fiat is repugnant to due process whether the decision is rendered by an administrative or judicial tribunal. As Judge Jerome Frank wrote in *U.S. v. Forness,* 125 F.2d 928 (2-NY 42):

> "The judiciary properly holds administrative officers to high standards in the discharge of the fact-finding function. The judiciary should at least measure up to the same standard." *Id.* 942.

Any person substantially hurt by a decision should be given the opportunity to know what is in the decision maker's mind. Those who are denied the relief claimed by them deserve to know why. See Leflar, *Some Observations Concerning Opinions,* 61 Col. LR 810 (61).

Traditionally, appellate courts, in well reasoned and thoughtful opinions, have apprised litigants of the court's reasons for deciding the case and by dint of painstaking justifications, the appellate courts have not only contributed to the development of the law but they have actually created the law. In turn, this procedure has in and of itself produced a viable appellate system. See *Llewellyn*, supra, 183, 195. The dilution of this practice to adjust to demands for efficiency undercuts both public confidence and constitutional values.

Admittedly, opinion writing has been an unfortunate fatality of the litigation crunch. But, how far may the interests of the parties and the integrity of the courts themselves be sacrificed in the name of expediency? The Supreme Court, as the final arbiter of due process and as the guardian of the integrity of the federal judicial system must answer the question. Is it historic that the legislative branch has dealt penuriously with the judicial one. Is it true that this country can no longer afford the high standards of justice for which it is renowned? We do not know but we are sure that the more that those standards are compromised, the less the resources that will be legislatively provided.

In search of solutions to the litigation crunch, the Commission on Revision undertook an extensive survey of attorney attitudes:

> "The most dramatic evidence of the importance which attorneys attach to a written record of the reason for a decision can be found in the view expressed by more than two-thirds of the attorneys surveyed that the due process clause of the Constitution should be held to require courts of appeals to write 'at least a brief statement of the reasons for their decisions.' Quite consistently, the respondents rejected the proposition that reducing the number of opinions issued is the most acceptable way to avoid long delays. * * * Attorneys were unwilling to buy speed with what appeared to them to be a sacrifice in the quality of the judicial product or the integrity of the process.
>
> * * * * * * * * *
>
> "Particularly striking is the fact that more than three-fourths of the attorneys questioned agreed that it is important for the courts at least to issue memoranda so that they do not give the appearance to litigants of acting arbitrarily, and so that litigants may be insured that the attention of at least one judge was given to the case. If the lawyer's perceptions are to be credited, the risk of harm to public confidence in the judicial system from unexplained decisions could become serious.
>
> * * * * * * * * *
>
> *"We recommended that the Federal Rules of Appellate Procedure require that in every case there be some record, however brief, and whatever the form, of the reasoning which impelled the decision."* Comm. Rev. Fed. Ct. Appellate Sys., *Structure & Internal Procedures*, 49-50 (1975).

When 5-*Cir. Loc. R.* 21 was adopted, the Court undertook an exposition upon its applicability in *NLRB v. Amalgamated*, 430 F.2d 966 (5-NLRB 70). The particular case was described as involving a run-of-the-mill board order turning wholly upon credibility choices that were amply supported. We agree that little or no opinion writing

should be required in such instance. However, the situation in *Amalgamated* is as different as night and day from the case in hand. The present case was extinguished by the District Court at the earliest pleading stage. Such peremptory action can only be upheld in the narrowest of instances. Where the trial court has acted peremptorily, sound judicial administration requires that the appellate court act more deliberately and carefully screen the case for error. In the present instance, the Court of Appeals has piled cursory disposition upon cursory disposition. Neither the fact situation found in *Amalgamated* nor the words of 5-*Cir. Loc. R.* 21 provide any basis for applying cursory procedures found in the present case.

Neither, petitioners respectfully submit, has the Fifth Circuit conformed its procedure in the present case to the standard which the Court promised to apply in the *Amalgamated* case:

> "But of decisive significance in each of these factors, singly or collectively, is the further judicial determination by the Court 'that an opinion would have no precedential value.'
>
> "It is here that the Court faces a heavy obligation. For as a part of the time-proved hierarchical system, this Court and each of its Judges must constantly bear in mind the distinctive role of an appellate court, particularly a United States Court of Appeals. Foremost, we are a court of review and in the Federal system a court of review of cases in which appeal is nearly always a matter of right, not a certiorari-type discretion. That means, of course, that we must consider in each case whether the outcome under review meets acceptable legal standards. But our role does not stop

there even though to the parties it is the results we ordain which count the most.

> "A most important function is the writing of opinions. Opinions are to serve a number of purposes at least two of which are highly significant. One is that an articulated discussion of the factors, legal, factual or both, which lead the Court to one rather than another result, gives strength to the system, and reduces, if not eliminates, the easy temptation or tendency to ill considered or even arbitrary actions by those having the awesome power of almost final review. The second, of course, is that the very discursive statement of these articulated reasons is the thing out of which law — and particularly Judge-made law — grows." *Id.* 972.

If the Court has maintained fidelity to its own rule, then the Court has decided that an opinion in the present case would have no precedential value. Considering the implications, petitioners cannot accept the proposition.

Since *Amalgamated*, the Fifth Circuit has applied *Rule* 21 at least 1,000 times, but, as far as we can determine, it has never again undertaken to publish any further opinions commenting upon the standards for the application thereof. Neither are we able to find any rulings upon petitions for rehearing, en banc or otherwise holding that the Court did or did not err in omitting an opinion in the first instance. Having declared for itself high standards for the application of the Rule, we fail to find evidence that the Court has taken steps to enforce its own standards. As Mr. Justice Black has said, self-restraint is the hardest restraint of all. Insofar as the Courts of Appeals fail to restrain themselves and fail to place proper restrictions upon the summary

procedures, it is incumbent upon the Supreme Court to intervene.

Rules 18 & 21 do not constitute the license to omit the accepted fundamentals of appellate procedure at will. If they are read in light of the importance widely and traditionally ascribed to full appellate review, inclusive of oral argument and an explanation of the court's decision; if they are read in view of the *Fifth Amendment,* they must be held to be narrow grounds for shortcuts in appellate procedure. They must be restricted to those cases governed by well established principles of law and the application thereof to commonly encountered fact situations. Properly used, they can be no more than a tool to weed out the routine and the repetitious. The case in hand simply does not fall into any such category.

Undoubtedly courts must deal effectively with the rising tide of appeals. But efficient procedures may not always be just. "The Constitution recognizes higher values than speed and efficiency." *Stanley v. IL,* 405 U.S. 645, 656 (72).

Moreover, part of the task of judicial argument and opinion is to insure the acceptance of the system of law in the society it governs. *Leflar,* supra, 812. From a narrower standpoint it is particularly desirable that the expectations of the legal community be realized. For "when your rooters stop rooting, your constituents lose ardor and even the general public begin to mutter" a crisis of confidence may develop. *Llewellyn,* supra.

If the above mentioned survey of attorney's values is valid, there is a great risk that confidence in the judicial system may be affected by abortive procedures.

Unquestionably the use of affirmances without opinions "is certainly not to be encouraged other than clearly deserving cases." Haworth, *Screening & Summary Procedures,* 1973 Wash. U.L.Q. 57, 72. Anything less than carefully controlled selective employment of the decision without explanation device leaves litigants with the impression that the result was reached by fiat, possibly without a clear understanding of the issues by the court itself. Comm. Rev. Fed. Ct. Appellate Sys., *Opinion Writing,* 7 (74).

We need to point out that the Fifth Circuit has two no-opinion rules, not just one. 5-*Cir. Loc. R.* 20 provides that "if it appears that the appeal is frivolous and entirely without merit," the Court may peremptorily dismiss. Such rule is in keeping with long-standing and widely used appellate practice. No substantial argument can be raised against *Rule* 20. Courts will not waste their time on patently worthless cases. But, the mere existence of *Rule* 20 serves to underscore the fact that *Rule* 21 was not designed with the trivial case in mind. It was designed to handle cases which go beyond the threshold of frivolousness but which the Court nevertheless deems not to warrant the benefits of full review. The parameters of *Rule* 21 are bound to be difficult of ascertainment. However, such fact provides no justification whatever for its wholesale usage.

We would also point out the statement of the Committee on Appellate Court Energies that arguments in favor of requiring the writing of opinions are distinct from the question whether those opinions should be published. It has firmly endorsed "the principle that all appellate decisions should be rendered in writing and that they should be sufficiently definitive to inform the parties of the court's

reasoning." Comm. on Use of Appellate Energies, *Standards for Publication*, 2-3 (Fed. Jud. Cnt. 1973).

Nor do we believe that the question being argued was disposed of in *Taylor v. McKeithen*, 407 U.S. 191 (72). We agree that the courts of appeals should have "wide latitude in deciding when and how to write opinions." Neither do we think 5-*Cir. Loc. R.* 21 facially deprives any constitutional rights or any other important rights. On the other hand, petitioners urgently submit that judicial discretion is not the equivalent of judicial license. Neither do we think that 5-*Cir. Loc. R.* 21 is self-defining nor that it may properly be invoked strictly at whim.

Even more importantly, *Taylor v. McKeithen* was decided without argument. According to the case summary, 40 U.S.L.W. 3356 (filed 12/13/71), the Fifth Circuit's failure to write an opinion was not even questioned in the petition for certiorari.

This Court there concluded that the failure to write an opinion hampered the Supreme Court in its own disposition of the case and for such reason alone, the Fifth Circuit was directed to prepare an opinion. See also *Northcross v. Bd. Ed.*, 412 U.S. 427 (73). From the discussion and the authorities just presented, such is but a single facet of the no-opinion problem. Petitioners join with the two out of every three American lawyers believing that the Due Process Clause requires an appellate court to indicate the grounds for its ruling, save, perhaps, in a completely pedestrian situation; certainly not comparable to the case in bar.

In a constitutional sense, the right of appeal is an extremely valuable right. It has been so held, both in a

criminal, *Griffin v. IL*, 351 U.S. 12 (56) and in a civil, context. *Lindsay v. Normet*, 405 U.S. 56, 77 (72).

Llewellyn has characterized the appellate courts as the "central and vital symbol of The Law." *Ibid.* 4. Over 150 years ago it was declared:

> "In order to guard against the fallibility of the human understanding and to shield the citizen from the attacks of injustice, it may be regarded as a cardinal principle in our land, that no single tribunal is entrusted with the sole determination of a man's property." *Yates v. People*, 6 Johns. 337, 455 (N.Y. 1810).

It follows that any substantial departure from "the course [that] hath prevailed from the oldest times," *Rochin v. CA*, supra, must be carefully supervised and proper guidelines not only imposed but enforced.

All states have recognized the importance of appellate review and by constitution, statutes and decision have provided for the plenary application thereof. In the federal system, "all final decisions of the district courts" are reviewable in the courts of appeals as a matter of right, 28 USC §1291; *Coppedge v. U.S.*, 369 U.S. 438, 448 (62).

The Fifth Circuit itself has agreed with the argument just presented:

> "The Court recognizes that it must — the word is must — never apply the Rule to avoid making a difficult or troublesome decision or to conceal devisive or disturbing issues. This means that while Rule 21 should make a real contribution to the goal of avoiding delays which can often amount to a denial of justice, it must be sparingly used." *N.L.R.B. v. Amalgamated*, supra, 972.

We also point out that the banking industry has numerous trade publications, and the "DO NOT PUBLISH" order has no application to them. They will (and perhaps already have) circulate reports that the federal courts have declined to grant relief from allegedly exorbitant "returned check charges" and allegedly sharp and overreaching practices in the handling of such items lending impetus to the practices here under attack. When a similar case arises in another district, it is likely that the bank's lawyer will have *Howell v. Metro* in his briefcase. Summary appellate procedures are neither a safe nor a legally acceptable hiding place for cases that the Court would rather avoid than decide. When such decisions come to light, they will be cited as authority for the very point which the court was attempting to avoid.

The Fifth Circuit has a self-imposed rule to the effect that the decision of one panel constitutes precedent binding upon all other panels of the Court and that a three judge panel of the Court must follow and apply all decisions by prior panels of the Court until they are set aside by the Court en banc. In *U. S. v. Ellis*, 547 F.2d 863 (5-TX 77), the Court decided that this rule applied even where the prior affirmance was a summary type, no argument/no opinion affirmance. Thus, it was observed in the concurring opinion, the Court has adopted the illogical position that a *Local Rule* 21 affirmance which supposedly has "no precedential value," constitutes binding precedent. Certainly, there must be a flaw in the web of logic producing this result.

In *Huth v. Southern*, 417 F.2d 526, 530 (5-TX 69) it is stated:

> "Obviously this Court, * * * must be the first to recognize that in making this delicate case-by-case judgment for or against oral argument, it can * * * make an error. Happily, under our system * * * any such error, or the claim of one, is open to review."

Ten years have passed along with innumerable cases omitting argument or opinion; or typically, argument and opinion. But we are unable to find where the Court of Appeals has ever ruled that its own guidelines have not been followed in making a classification which is necessarily "delicate." In fact, we cannot find where the Court has ever agreed to receive en banc argument as to the interpretation or application of these important rules. It occurs to us that they should be revisited at least once each ten years. Insofar as the Fifth Circuit has failed to police itself, it is incumbent upon the Supreme Court to intercede.

The need has arisen for the Supreme Court to implement standards and guidelines of its own and to provide some enforcement of the same. The enforcement should not be difficult. Wherever the Supreme Court determines that the case was too peremptorily disposed, it need only vacate and remand. Petitioners leave only this concluding caveat: Circuit judges are human beings possessed of all the normal weaknesses of the flesh. Surveys reflect that in the vast majority of instances lower courts have found new grounds to reinstate their previous judgment after this Court vacates and remands.

When a case is vacated and remanded because the Court of Appeals erred by employing summary procedures, it is all too easy for the Court of Appeals to imply a personal criticism from its prior handling of the case. The temptation

to convert the argument and the opinion writing function into an exercise in self-justification is obvious and the total lack of any prior indication as to the Court's thinking leaves ample room to engage in that all too human tendency. This case and any other cases remanded for failure to prepare an opinion should be accompanied with the instruction that the case be heard anew by another panel.

It is the established practice that whenever a criminal action is reversed for errors in the sentencing procedure, that the remand order contain instructions that the defendant be re-sentenced before another judge. *U. S. v. Huff*, 512 F.2d 66 (5-GA 75). The practice fulfills two very significant objectives of the law. Firstly, the rule that sentencing must be had before another judge is prophylactic in its operation. Secondly, nothing less will fulfill the often repeated maxim that not only must justice be done; justice must appear to have been done.

The error of which petitioners complain was the error of the Court of Appeals itself in applying summary procedures to a case which cannot legitimately be disposed on a summary basis. For such reasons, the case should be heard anew by another panel of the Fifth Circuit. The case has been inadequately considered and a simple order to reconsider the previous inadequate consideration is insufficient. Petitioners should be granted hearing de novo before a new panel. The panel on remand should be instructed to hear oral argument, to independently reach its own judgment and to deliver an opinion in support thereof. Any lesser relief will too often prove illusory.

QUESTION TWO:

The Misapplication or Purloinment of Federally Insured Deposits Is A Matter of Interest To The Federal Courts.

Petitioners submit that they are possessed of a substantive cause of action by virtue of the Federal Deposit Insurance Act and related statutes.

12 *USC* §§1811-1832 creates the FDIC and spells out its powers and duties. It is undenied that respondent is an insured bank as defined in the statute. The statute constitutes a broad based regulatory scheme providing for periodic examination of insured banks, permissible holdings, prohibited investments, maximum rates of interest payable, and even provides that insured banks must advertise themselves as members of FDIC. It cannot be denied from a reading of the statute that Congress has gone far in the supervision and regulation of insured banks.

18 *USC*, §§656, 657, 1005 & 1006 have been quoted above. Suffice to say, they directly forbid the purloinment or misapplication of federally insured funds. Petitioners would emphasize the comprehensive nature of the federal regulatory scheme. While the statutes relied upon do not expressly grant the right to bring a private cause of action, it is obvious that the petitioners come directly within the class of persons for whose benefit the statute was enacted. Under such situation, the law will imply a right of action in the petitioners.

The leading case on implied rights of action is *Reitmeister v. Reitmeister*, 162 F.2d 691 (2-NY 47) where Judge Learned Hand held that the sections of the Communications Act declaring the unauthorized interception and publication

of interstate telephone messages to be criminal created a federal cause of action.

> "Although the Act does not expressly create any civil liability, we can see no reason why the situation is not within the doctrine which, in the absence of contrary implications, construes a criminal statute, enacted for the protection of a specified class, as creating a civil right in members of the class, although the only express sanctions are criminal."

The Court relied on Res., *Torts*, §286:

> "§286. VIOLATIONS CREATING CIVIL LIABILITY. The violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the actor liable for an invasion of an interest of another if:
>
> (a) The intent of the enactment is exclusively or in part to protect an interest of the other as an individual; and,
>
> (b) The interest invaded is one which the enactment is intended to protect; and,
>
> (c) Where the enactment is intended to protect an interest from a particular hazard, the invasion of the interests results from that hazard; and,
>
> (d) The violation is a legal cause of the invasion, and the other has not so conducted himself as to disable himself from maintaining an action."

Reitmeister is particularly analogous because it did not create a right of action not previously recognized by state law. Invasion of privacy was first recognized by state

courts around the turn of the century. Warren & Brandeis, *The Right to Privacy*, 4 Harv. LR 193 (1890); *Rhodes v. Graham*, 37 SW2d 46 (KY 31). Essentially, *Reitmeister* held that use of the instrumentalities of interstate commerce creates a federal action for invasion of privacy.

> "Increasingly, the tendency in the federal courts is to infer private rights of action from federal statutes unless to do so would defeat the manifest Congressional purpose." *Wheeldin v. Wheeler*, 373 U.S. 647, 662 (63) (dissenting opinion).

In *J. I. Case v. Borak*, 377 U.S. 426 (64), the plaintiffs sought to enjoin the circulation of a proxy statement. Defendants contended that the statute merely undertook to set out powers and duties of the SEC and did not create a private right of action. Jurisdiction was upheld:

> " 'When a federal statute condemns an act as unlawful, the extent and the nature of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted.'
>
> "* * * It is for the federal courts 'to adjust their remedies so as to grant the necessary relief' where federally secured rights are invaded."

See also, *Tunstall v. Firemen*, 323 U.S. 210 (44); *Neiswonger v. Goodyear*, 35 F.2d 761 (ND OH 29); *Roosevelt Field v. N. Hampstead*, 84 FS 456 (ED NY 49).

Even more directly in point is *Fitzgerald v. Pan-American*, 229 F.2d 499 (2-NY 56), where a Negro singer and her party who were refused airline transportation brought suit

under the Civil Aeronautics Act prohibiting "unjust discrimination" against "any particular person, port, locality, or description of traffic:"

> "Defendants, however, argue that Section 484(b) merely states the common law rule * * * and, therefore, especially as Section 676 preserves all remedies at common law, there is here no basis for federal jurisdiction, * * *
>
> "We think * * * [the Act] created a new federal right. Although a right created by a federal statute covers the same ground as a right already existing under the common law of the states and territories, a suit based on that federal statute is one 'arising under' a law of the United States, so that a federal district court has jurisdiction under 28 USC, § 1331 * * *."

The logic of the decision is strongly supported by the fact that Congress has enacted a broad based scheme of regulation for the air transportation industry. The same may be said with reference to insured banks. The interest rates which they may pay to depositors is regulated. The interest rates which they may charge to borrowers is regulated. Does it make sense to say that the federal courts have no power to pass upon the fees which they charge for their alleged "services?" We think not.

Wyandotte v. U. S., 389 U.S. 191 (67), held that a criminal statute prohibiting obstruction of the waterways created, in the government's favor, a cause of action for the cost of removing an obstruction caused by the defendant's negligence. Citing *Reitmeister* and other cases, the Supreme Court held:

> "Because the interest of the plaintiffs in those cases

> fell within the class that the statute was intended to protect, and because the harm that had occurred was of the type that the statute was intended to forestall, we held that civil actions were proper."

Brown v. Bullock, 194 FS 207 (SDNY 61), *aff.* 294 F.2d 415 (61), is the closest case in point that we can find. In a suit for charging excessive fees, defendants denied there was a federal question contending that the Investment Company Act did not regulate management fees. Plaintiffs urged a section of the Act making it a federal crime to convert or embezzle from an investment company. Defendants replied there was no such claim; that the suit only alleged common law charges of waste and breach of fiduciary duty. Held for plaintiffs. The criminal statute demonstrated a clear Congressional intent to protect investment companies from appropriation by those in management and control. Held further, the Congressional intent should not be restricted to instances of willfulness and scienter necessary to secure a conviction. The case is on all fours with the case in bar.

In *Supt. of Ins. v. Bankers*, 404 U.S. 6 (71), the Supreme Court acknowledged that the Securities Act "did not seek to regulate transactions which constitute no more than internal corporate mismanagement." It nevertheless held the statute created a cause of action because " 'disregard of trust relationships by those whom the law should regard as fiduciaries are all a single seamless web.' "

Bivens v. Six Agents, 403 U.S. 388 (71), was a suit for violation of plaintiff's Fourth Amendment rights:

> "In respondents' view * * * the rights that petitioner asserts — primarily rights of privacy — are creations of

state and not of federal law. Accordingly, they argue, petitioner may obtain money damages to redress invasion of these rights only by an action in tort, under state law in the state courts."

The contention was rejected: " 'Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.' "

Partain v. 1st Nat'l, 467 F.2d 167 (5-AL 72) was a usury suit against a national bank. The court found a federal question even though the Banking Act merely prohibits interest charges in excess of the amount allowed by state law.

"We are convinced that * * * the District Court had jurisdiction under 28 USCA, § 1337. * * *

"There is an increasing recognition of the breadth of this provision. * * *

" 'Acts regulating commerce' are coming rapidly to mean all acts whose constitutional basis is the Commerce Clause."

Partain was relied upon in *De Jesus v. LTV,* 412 FS 4 (NDTX 76).

"Several factors are relevant in determining whether a private remedy is implicit in a statute not expressly providing one:

"First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted * * * — that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a

remedy or to deny one? * * * Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? * * * And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?' "

(1) It can hardly be doubted that the entire objective of the Federal Deposit Insurance Act was to protect the public. Historically, the original justification for the National Banking System was to create depositories for funds due to the United States. However, no such purpose has ever been ascribed to the Deposit Insurance Act. In fact, national banks had a monopoly upon federal deposits until very recent years.

Nor was the Deposit Insurance Act enacted for the purpose of protecting the insured banks themselves. In case of the loss of insured deposits, the loss must be borne by the bank's stockholders. The insurance only comes into play after the stockholders' capital has been exhausted. If there is any defalcation of officers and directors, the FDIC is subrogated to the rights of the bank to pursue errant officers and directors for personal liability. Nor was the Deposit Insurance Act for the protection of the government. The government did no business with state chartered banks until long after the Deposit Insurance Act was enacted. The statute would never have been enacted if protection of the government were the objective. It follows that the real objective of the entire act is to protect depositors.

(2) We think there is substantial evidence, although implicit, of a legislative intent to create the remedy here being asserted. A false entry is actionable even though the

bank suffered no loss, *U. S. v. Biggerstaff,* 383 F.2d 675 (4-NC 67). *U. S. v. Mann,* 517 F.2d 259 (5-TX 75) declared: "It is not necessary for the Government to allege or prove that the bank actually suffered any loss as a result of defendant's actions."

The *Mann* case was held controlling in the factually identical case of *U. S. v. Larson,* 581 F.2d 664 (7-WI 78) involving misapplication of the funds of a state chartered bank. Held further, the board of directors of a bank cannot ratify the misapplication of funds.

An examination of the statutes themselves reflects the individual depositor is within the protection of the Deposit Insurance Statute. 18 *USC,* §656 forbids the wilful misapplication of *any* funds "intrusted to the custody or care" of an insured bank. The identical provision is contained in 18 *USC,* §657. 18 *USC,* §1005 forbids false entries made with intent to injure "any individual person." 18 *USC,* §1006 forbids false entries with intent to defraud "any individual." Protection of the bank is incidental to the entire statutory scheme. Protection of the individual depositor is foremost. Even further, the statutes go far beyond the protection of the FDIC *in its capacity as a corporate entity.* There is no requirement that the FDIC sustain a loss in order to make the statute operative. As a matter of fact, the loss sustained by an individual may create liability neither upon the bank or upon the FDIC. Nevertheless, if it is perpetrated through an insured bank, it violates the statute. *U. S. v. Biggerstaff,* supra.

A daylight robbery of an insured bank at gunpoint is undeniably a violation of federal law. The same is true with respect to a burglary committed by dynamiting a bank vault by night. It is also obvious that the statutes protect

depositors from the raiding of their accounts not only from those who work from the outside but from those who work from the inside. The depositor is the beneficiary of the entire scheme of regulation. Does it make any difference that the bank itself, as a corporate entity, purloins the assets of the depositor either through wilful misapplication or false book entry? If the law is logic, then the law says "No."

(3) The third question is answered by *De Jesus*:

> "The third factor of consistency with the underlying purpose of the legislative scheme is achieved by implying a private remedy in the case at bar. The maintenance and regulation of interest subsidies and loan guarantees for student borrowers can and should be advanced by vigorous prosecution of claims such as plaintiff's claim, since obviously the Commissioner cannot investigate and prosecute every violation within his area of expertise."

Obviously, the FDIC cannot police every fee charged by every insured bank. It cannot prosecute every unsupportable, exorbitant or unconscionable charge although such charges are just as much subject to condemnation and just as inimical to the insured depositor as the misconduct in *Biggerstaff* and *Mann.* It follows that a private right of action enhances the legislative scheme.

(4) Prior to passage of the Deposit Insurance Act in 1933, the regulation and supervision of state chartered banks was almost exclusively a matter of state law. Since then, however, practically all state chartered banks have joined the FDIC and a cooperative plan has been developed for the regulation of state chartered banks. In most

instances, misconduct directed at a state bank or its depositors will be a violation of both federal and state law. In such instance, the transgressor may be pursued under state or federal law or both. *Weir v. U. S.*, 92 F.2d 634 (7-IN 37). We think the misconduct here alleged is a violation of the Texas Deceptive Trade Practices Act and also that it violates the Texas decisional law relating to illicit business practices, fraud, deceit and misrepresentation. This is all beside the point because the regulatory scheme is not exclusive either with the State or with the Government.

Money changers were described as scoundrels in the time of Christ. Shakespeare did not cast Shylock in the role of the hero in the Merchant of Venice. For such reason, banking and finance have been regulated industries since the time that the memory of man runneth not to the contrary. This is not a polemic against bankers nor even a broad brush attack upon the banking industry. We only point out that bankers have always been possessed of great power including the power to overreach and, historically speaking, banks have not uniformly acted in accordance with that image of a "public service institution" which they are so fond of projecting.

Close regulation of banking has always been necessary and the federal presence in the field dates from earliest times. *McCulloch v. MD*, 4 Wheat (17 U.S.) 316 (1819). The federal banking statutes have been held to create or control private rights for fifty years or more. *Holman v. Moore*, 242 NW 839 (MI 32); *Dibrell v. Central*, 293 SW 875 (TXCV 27); *Third Nat'l v. Baker*, 91 SE 346 (GAAP 17).

In recent years there have been a number of cases holding that the regulatory statutes applicable to federally supervised financial organizations creates an implied private

right of action. In addition to the cases already cited, petitioners cite *Cupo v. Community Bank*, 438 F.2d 108 (2-NY 71); *Cosgrove v. First*, 68 FRD 555 (EDVA 75); *People ex rel Bowman v. Home*, 521 F.2d 704 (7-IL 75); *Kupiec v. Republic*, 384 FS 1008 (NDIL 74); *Nat'l. Retailers v. Valley*, 411 FS 308 (DCAZ 76) and *Milberg v. Lawrence*, 496 F.2d 523 (2-NY 74).

Fifty years ago, the argument that the activities of state banks is "traditionally relegated to state law," *De Jesus v. LTV*, supra, might have been valid, but times have changed. The creation, preservation and regulation of the monetary system has become an ever greater concern of the federal government. At least since the Deposit Insurance Act, the activities of state banks can no longer be held "basically the concern of the States." Those banks are a matter of mutual concern, federal and state. Petitioners were therefore possessed of the right to elect the federal forum to vindicate federally created rights.

RESPONDENTS' AUTHORITY IS DISTINGUISHABLE

We believe the respondents' case of *Jenkins v. Fidelity*, 365 FS 1391 (EDPA 73) to be distinguishable. That plaintiff, a stockholder of Lavendar Corporation, brought a derivative action against the corporation, its officers and directors, the bank and others alleging a conspiracy to issue a misleading offering circular. The principal omission as alleged was that the proceeds of the offering were to be primarily used to pay pre-existing indebtedness to the bank and a development fund rather than being made available for general corporate purposes. It was held that 18 *USC*, §§656 and 1006 did not provide jurisdictional grounds

against the fund, (emphasis: against the fund), which was neither an officer nor an employee of the bank. In the case at hand, the statutes in question are not being used for the purpose of asserting jurisdiction against third parties. *Jenkins* is distinguishable. *Id.* 1399-1400.

The *Jenkins* Court also stated in passing that the two statutes provide "no civil remedy." There is no discussion of the doctrine of implied remedies. There is no citation of authority. The offhand statement contained in *Jenkins* cannot be considered as controlling in the case at bar. Petitioners have already discussed *De Jesus v. LTV*, supra and *Partain v. 1st Nat'l*, supra. The latter cases are well considered and well documented. If they are in conflict with *Jenkins*, they are clearly the preferable authority. See also *First Nat'l v. Smith*, 436 FS 824, 829 (SDTX 77), a civil action in which the court found that the activities of bank officers in receiving commissions on credit life insurance sold to borrowers "may well violate 18 *USC*, §656 governing misapplication" of funds. In short, a criminal statute (the identical statute construed in *Jenkins*) controlled the activities of bank officers and governed the outcome of a civil action. The case is of particular importance because the present petitioners also rely on 18 *USC* §656. See also *Fidelity v. Aetna*, 440 FS 862, 873 (NDCA 77).

Whether or not the lending rates of a national bank are usurious is a federal question, *Partain v. 1st Nat'l*, supra; *Roper v. Consurve*, 578 F.2d 1106 (5-MS 78). Whether or not the officers of a national bank may collect side money is a federal question, *First Nat'l v. Smith*, supra; *Fidelity v. Aetna*, supra. It follows that whether or not a national bank may purloin or misapply the funds of a depositor through

the charging of oppressive, unfounded and unconscionable fees is likewise a federal question.

Should any different rule be applied to federally insured banks with state charters? We fail to see a distinction. The regulatory scheme is comprehensive in both instances. The two systems compete directly one with the other. It follows that both should be subject to the same limitations, else one will have a competitive advantage over the other. It was undoubtedly this reasoning which persuaded Congress to provide that national banks may charge whatever rate of interest that state banks may lawfully charge.

Even further, the identical statutes, 18 *USC*, §§656-657, 1005-1006, apply equally to national banks and to insured banks. Congress again intended that both systems be treated alike.

It was early held that a question as to the liability of a party giving a note to an insured bank is a question of federal law. *D'Oench v. FDIC*, 315 U.S. 447 (42). Accord: *FDIC v. Meo*, 505 F.2d 790 (9-CA 74); *Feinberg v. FDIC*, 522 F.2d 1335 (CADC 75). Simile: *Katin v. Apollo*, 460 F.2d 422 (7-IL 71). Petitioners assert on the strength of logic and precedent that a federal question arises with respect to the activities of an insured bank wherever a federal question would arise with respect to the activities of a national bank.

THE PARTY WHO INVADES AN INSURED DEPOSIT HAS THE BURDEN TO PROVE THAT IT HAD AUTHORITY TO DO SO AND THAT SUCH AUTHORITY WAS NOT EXCEEDED

(1) It appears to petitioners that the respondents have an entirely different concept of the relationship between

banker and depositor than the concept held by petitioners. Respondents appear to take the position that the bank may at any time it pleases, deduct from the depositor's account any amount of money which respondent bank pleases as a fee for the bank's services. Respondent is further of the apparent position that *the customer has the burden of proving the bank's lack of authority to do so.*

(2) Petitioners urgently submit that the shoe is on the other foot. Respondent has the cart before the horse. Deposits in an insured bank may not be raided at will by robbers or burglars or by the bank's own personnel. The situation is no different whether the bank personnel seek to line their own pockets or to gain an unconscionable profit for their employer, the corporate entity itself. The Federal Deposit Insurance laws forbid any sums from being withdrawn from a deposit except with the express permission of the depositor.

May we repeat for emphasis, because this is the gist of the entire case: The Federal Deposit Insurance laws forbid the withdrawal of any funds from an insured deposit without the consent of the depositor. *This is the heart of the entire complaint.* This is the argument upon which our whole cause of action revolves.

(3) This does not mean that insured banks must render services to their customers free of charge. It simply means that these banks must adopt a standard schedule of charges. They must advise their customers in advance exactly what those charges are. The charges must be reasonable. Respondents have failed to comply with any of these minimal requirements of sound banking practice. For such reason, respondents must refund the amount of money which has been purloined from the plaintiff-class.

(4) We further submit as a correlary proposition that the Federal Deposit Insurance statutes prohibit overreaching, sharp practices and unethical devices calculated to purloin money from an insured account. We refer to the bank's established policy of omitting notice to the depositor that his check has been bounced. This is clearly an unlawful scheme deliberately calculated to purloin the funds of the depositor. The insured depositor is deliberately left in a position of helpless peril, encouraging the innocent writing of still more hot checks to the greater profit of the bank. Even further, the hot check charge enhances his peril because the insured balance is further reduced by the charge itself causing even more checks to bounce and further profit to the bank. Another practice equally unconscionable is the practice of charging two or three hot check charges with respect to a single check. When this practice is coupled with the practice of omitting notice to the depositor, it becomes highly opprobrious.

(5) Furthermore, respondent bank follows a practice of attaching to the customer's monthly statements when the customer is finally advised that his checks have been bounced, an explanation slip representing that the hot check charge, amounting to as much as $6.00 per entry, is being levied to reimburse the bank for its "cost of handling" an insufficient item (P.A.10). In truth and in fact, the charge levied is from 50 to 100 times the direct identifiable extra expense of processing an insufficient item. These slips delivered to customers along with their bank statements and filed among the records of the bank constitute false entries "in any book, report or statement" of an insured bank. *U. S. v. Biggerstaff,* supra; *U. S. v. Foster,* 566 F.2d 1045 (6-TN 77).

(6) Petitioners further urge that the Federal Deposit Insurance statutes prohibit all types of overreaching by those with the power to dip into insured deposits at will. The relationship between banker and customer is both sensitive and unbalanced. The ordinary merchant must send out a bill or collect his money over the counter as the goods are delivered. Bankers have the naked, raw power to dip into insured deposits at will upon any pretext which they may envision. The depositor has little or no control over the situation and is saddled with the uphill battle to seek a refund of that which should not have been taken in the first place.

(7) Until the advent of the securities laws, the traditional wisdom of the law provided that the relation of buyer and seller prevailed between one who sold or promoted the sale of securities and one who purchased. The rule of caveat emptor prevailed and the mulcted purchaser was burdened to prove express fraud. The concept has become wholly unacceptable in the latter part of the twentieth century, largely, to petitioners' way of thinking because of the disparity between the parties; the economic power, the bargaining power, the ability to know the true facts and the expertise to conceal or gloss over the deficiencies of the offering all lay on one side.

The securities laws have shifted the burden of proof. Not only must the seller prove that it told the truth, it must prove that it told the whole truth (full disclosure). While the relation has yet to be labelled as fiduciary, it has assumed a quasi-fiduciary nature.

(8) Petitioners urge that the identical relation must be recognized between banker and depositor. It has long been held that banking is a business affected by the public

interest. Banks have been described as being corporations "quasi-public in nature," AMJR 2d, *Banks*, §10. The cases herein have emphasized the sensitive nature of the relation. Other cases have held bank officers personally liable (and also liable to federal prosecution) for accepting deposits into a failing bank. The quasi-public or quasi-fiduciary nature of the relation demands as much.

The law has long burdened a fiduciary to prove the reasonableness of his own compensation. Even where the cestui is fully competent, and where the fee has been contracted and collected, it is still open to challenge as unreasonable. Only after full and fair disclosure; only after informed approval secured free from the taint of coercion is the fee insulated from challenge.

Those who unilaterally invade insured deposits must be held to the same standard. If the "cost of handling" a hot check really is $6.00, respondent has the burden to prove its own proposition. If it is reasonable to levy two and three hot check charges with respect to the same item, respondent has the burden to so prove. If it is acceptable banking practice (and therefore reasonable) to remove funds from the depositor's account without notice and thereby expose the depositor to the risk that hot check charges will pyramid, respondent with its expertise and superior economic power can easily shoulder the burden to establish its contention.

(9) On strength of *Partain* and *Smith*, petitioners ask:

A. Assume that respondent was chartered as Metro National Bank of Dallas and a class action was brought by respondent's borrowers to stop respondent's officers from pocketing credit life commissions generated by petitioner's

loans. In light of *Partain* and *Smith*, the case could hardly be dismissed for failure to state a claim upon which relief could be granted even though no federal statute expressly authorizes such action. The suit should be entertained because the very essence of class action litigation is to assist regulatory officials in fulfilling their expertise, *De Jesus v. LTV*, supra.

B. Assume next that the Comptroller of the Currency issued a letter ordering Metro National Bank to desist from the hot check charges and hot check practices disclosed by this record, and respondents sued to test the directive. Of course, there would be jurisdiction because the Comptroller is a federal official, but what law would be applied? Petitioners cannot conceive this Court as holding that the validity of the order rests solely on principles of state law and is thus valid in 38 jurisdictions and void in 12. It doesn't make sense!!

C. Now, re-assume situation A but consider that defendant is a federally insured bank with a state charter. Would it change the result? We think not.

D. Next, re-assume situation B except that the letter comes from the Chief Examiner of the FDIC to an insured state bank. Relying on the *D'Oench v. FDIC* line of cases, petitioners submit that the result is B & D would be the same.

E. Now assume the facts in bar. If petitioners are correct regarding A, B, C & D, it follows that petitioners are correct with respect to situation E.

(10) Petitioner's argument ends where it began. Those who assume the right to apply "moneys, funds, [or] assets * * * intrusted" to an insured bank (18 *USC*, §656)

have the burden to prove that the funds were not "misapplied." The mere power to "apply" the depositor's funds to the use of the bank creates a quasi-fiduciary duty to prove that consent was given, that it was not exceeded and that the charge made was, in fact, reasonable, *Brown v. Bullock*, supra. Nothing less will effectively inhibit the "purloinment" of an insured deposit.

QUESTION THREE:

As Filed, Respondents' Motion To Dismiss Is Without Substance.

As discussed under "Statement of the Case," respondents stated five separate grounds in their motion to dismiss. The District Court granted the motion without specifying the grounds upon which it was acting. Under the rules of Appellate procedure, as we understand them, this places the burden upon the appealing party to brief and argue the error in all five of these possible grounds of decision in order to meet the burden of briefing the entire case. In the present instance, the burden is hardly onerous because all five of respondents' grounds as stated, are plainly not well taken.

(1) THE $10,000 MINIMUM JURISDICTIONAL REQUIREMENT DOES NOT APPLY.

Respondents urged in their motion to dismiss that the claims of the individual members of the plaintiff class amount to less than $10,000 each and that the same may not be aggregated (R.10-11). The contention missed the point entirely. No minimum jurisdictional amount is required.

Petitioners rely on the *Federal Deposit Insurance Act*,

12 USC §§1811-1832 and the statutes protecting insured deposits from purloinment or misapplication, which have been quoted under "constitutional provisions, statutes and rules involved." The companion jurisdictional statute provides:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress relating to commerce * * *" 28 *USC*, §1337.

In the amended complaint, petitioners have alleged the foregoing statutes as a jurisdictional basis of this case. No jurisdictional minimum is specified in the statutes and none is required.

Professor Wright states that the $10,000 minimum jurisdictional amount is rarely required in federal question cases. "The requirement is of extremely limited application, and when it does apply the effect is to deny a federal forum in cases which the amount involved is small but for which the federal courts have a special expertness and special interest." Wright, *Fed. Cts.*, §32 (1976).

The Federal Deposit Insurance Act is an act regulating commerce. *Weir v. U. S.*, 92 F.2d 634 (7-IN 37). In *Partain v. 1st Nat'l*, 467 F.2d 167 (5-AL 72), §1337 jurisdiction was upheld in connection with an alleged violation of the National Banking Act, 12 *USC*, §§85, 86. A similar holding was made in *Murphy v. Colonial*, 388 F.2d 609 (2-NY 67). With regard to the Homeowners' Loan Act of 1933, 12 *USC*, §1464, it was held in *Murphy* that in order to have §1337 jurisdiction, it was not necessary that the substantive statute be grounded exclusively on the commerce clause, only that the statute have a substantial connection with the commerce clause. Accord: *Winningham v. HUD*, 512 F.2d 617, 621 (5-GA 75).

(2) PETITIONERS' FEDERAL CLAIM IS NEITHER IMMATERIAL NOR SO INSUBSTANTIAL AND FRIVOLOUS AS TO WARRANT DISMISSAL FOR WANT OF JURISDICTION.

Respondent bank moved to dismiss "for reason that the Court lacks jurisdiction over the subject matter of this suit" (R.11) and the district court appears to have sustained the contention (P.A.17).

The respondent has failed to notice the following basic proposition: Where the plaintiffs have asserted a tenable claim under federal law, federal jurisdiction attaches even if the claim be ultimately held without merit. *Bell v. Hood*, 327 U.S. 678 (46). That case was an action against FBI agents for damages for violation of rights protected by the Fourth and Fifth Amendments. The lower courts dismissed for want of jurisdiction holding that the complaint stated only a common law action for trespass and invasion of privacy, but the Supreme Court reversed:

> "Before deciding that there is no jurisdiction, the District Court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States. For to that extent 'the party who brings a suit is master to decide what law he will rely upon. * * *' *Where the complaint as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted, must entertain the suit.* * * *
>
> "Whether the complaint states a cause of action on which relief could be granted is a question of law and, just as issue of act, it must be decided after and not be-

fore the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state any grounds for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. * * * The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes *clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such claim is wholly insubstantial and frivolous.*" (Emphasis supplied)

In determining that the question was substantial, the Court pointed out that the right to recover damages for violation of the Fourth and Fifth Amendments had never been passed upon and cited numerous cases holding that where federally protected rights have been invaded, the federal courts will imply a remedy. Likewise, the petitioners here rely upon numerous cases holding that where federally protected rights have been invaded, the federal courts will imply a remedy.

Insofar as the materiality of federal law is concerned, the Court pointed out that petitioners' right to recover would stand or fall according to the interpretation placed upon the Constitution and laws of the United States. Likewise, the right of these petitioners to recover *upon their federal claim* will stand or fall according to the interpretation placed upon the Federal Deposit Insurance Act.

We repeat for emphasis. The right to recover *upon their* federal claim will stand or fall according to the interpretation of the Federal Deposit Insurance Act. The language in certain cases is subject to possible misinterpretation, but it

is obvious that the Supreme Court was speaking only of the right to recover *upon the federal claim.* The courts were in agreement from the district court through the Supreme Court that the petitioners in *Bell* had pleaded a cause of action under state law. Mr. Justice Black's test of materiality had nothing to do with state law. The point was further illustrated by the dissent which argued that the ultimate effect of the majority holding would be to transfer jurisdiction to the federal court of "the trial of the allegations of trespass to person and property, which * * * [the dissent urged, was] a cause of action arising wholly under state law." To a certain extent, the dissent is correct. It is a basic principle of law that once jurisdiction attaches, it is neither terminated nor divested by subsequent events. The answer to the problem posed by the dissent is that federal courts have wide discretion to relegate ancillary or pendent state law claims to the state courts.

The principles enunciated in *Bell* need little further elaboration. The materiality test is best illustrated by pointing out that which the courts have held not to be material. For instance, the mere fact that a defendant bank had been chartered by the federal government would ordinarily be immaterial. *Southern Elec. v. First Nat'l,* 515 F.2d 216 (5-AL 75). We say "ordinarily" because the terms of the charter and federal law regulating its activities could conceivably be a viable issue between the parties, but where there is no such issue, there is no federal jurisdiction. We find the distinction recognized in *Creel v. Atlanta,* 399 F.2d 777 (5-GA 68), relied on by respondents, where the court found first, that it had jurisdiction and second, that the plaintiff was not entitled to recover upon its federal claim. To the same effect, see *Gibson v. First,* 504 F.2d 826 (6-OH

74) and *Goldman v. First*, 518 F.2d 1247 (7-IL 75). Also in *Wheeldin v. Wheeler*, 373 U.S. 647 (63) (dissent) the Supreme Court expressly noted that under *Bell*, the federal court had jurisdiction even though it held the federal claim without merit. We also note that in *Bivens v. Six Agents*, 403 U.S. 388 (71), the Supreme Court pointed out that it had finally arrived at the merits of the question which it failed to reach in *Bell v. Hood*, and found that a cause of action did exist in fact.

Without jurisdiction, federal courts would be powerless to construe federal statutes. Presently, the dismissal for "lack of jurisdiction over the subject matter," R. 12(b)(1), FRCVP, infers an opinion that the misconduct alleged does not violate federal law. How much more it would have benefitted the science of jurisprudence had either of the Courts below spoken directly to the question presented rather than skirt the issue.

Respondents never alleged petitioners' claim to be clearly immaterial or wholly insubstantial and frivolous; *Bell v. Hood*, supra. The Courts below have made no such finding. There is no basis for such contention. The District Court erred in dismissing for "lack of jurisdiction over the subject matter" (R.67). The Fifth Circuit erred if it based its affirmance on such grounds.

(3) DISMISSAL FOR FAILURE "TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED IN A CLASS ACTION" WAS IMPROPER.

(1) Respondents urged the District Court that the case should be dismissed because, in their view, "the Complaint fails to state a claim upon which relief can be granted *in a class action*" (R.10). In apparent response to the plea,

the District Court has dismissed the entire cause of action "with prejudice" (R.67).

In support of its claim, respondent bank has baldly alleged that it is *not* impractical to bring all 10,000 members of the class before the Court, that the interests of the class members are "distinct and adverse," and that petitioner Howell does not adequately represent the class; supposedly because his interest is "not identical or coextensive," that his interest is "different" and "adverse" and because other class members have differing "rights and duties" (R.10).

We reiterate the lack of an evidentiary hearing and of documentary proof of the nature required to buttress a motion for summary judgment. Cases should rarely be dismissed upon the pleadings alone. *Conley v. Gibson*, 355 U.S. 41 (57). We point out that upon a motion for dismissal, the defendant is the moving party who has the burden to establish the complete invalidity of the plaintiff's case.

Are respondents' propositions necessarily true just because the respondents say so? The claims were never developed. Allegations do not prove a case. They are only a framework for the presentation of proof and respondent has offered none.

Partain v. 1st, supra, and *Roper v. Consurve*, 578, F.2d 1106 (5-MS 78) cert.gr.oth.gds. 47 USLW 3586 (MH 5 79) are clear authority for certifying the class in this case. *Roper* was reversed in favor of the class plaintiffs even though it was recognized that each credit card account must be separately examined to determine if usury was involved. The large number of card holders and the smallness of the individual claims were pointed out as factors enhancing the desirability of the class action form if not actually necessi-

tating the same. With respect to the desirability of a class action proceedings, it appears to us that the present case is on all four with *Partain* and *Roper*.

(2) Furthermore, it is obvious that class action questions are all premature. R.23(c)(1), FRCVP provides that the district court "shall determine by order" whether or not a case is to be maintained as a class action. An order dismissing "with prejudice" does not constitute the type of order contemplated by the rule. Due order of pleading calls for the court to dispose of class action questions after jurisdictional claims are disposed of. *De Jesus v. LTV*, supra. Petitioners have not had a fair hearing on the desirability of certifying the class.

Respondents have indicated the possibility of moving for summary judgment on the merits. If there is a substantial likelihood that such a motion may be forthcoming, petitioners submit that the question of class action certification should abide the disposition of the summary judgment motion. This is particularly true where a defendant seeks to discover or if there is a probability that he will move on the basis of some supposed impediment to the named plaintiff's right of recovery that is not common to the entire class. The court can better decide whether or not the named plaintiff is an adequate representative of the class after discovery has been completed and the summary judgment motions have been heard. As with other matters, the question of certifying the class should rarely be decided upon the barebones pleadings.

(3) Nor was it proper for the Court to dismiss the entire case upon a claim that the class action aspects of the case were bad. The absolute illogic of so doing is obvious.

The named plaintiff, petitioner Howell is still entitled to be heard on his individual claim.

Respondent bank has offered no cases supporting its contention that the baby must be thrown out with the bath water. Respondent has argued *Turoff v. May,* 531 F.2d 1357 (6-OH 76) on a related proposition, but we note that the court there expressly held that the named plaintiffs were entitled to continue the case for individual relief even though class certification was denied. The Fifth Circuit held to the same effect in *Garonzik v. Shearson,* 574 F.2d 1220 (5-TX 78). We do not believe there are any cases holding otherwise.

(4) It is likewise premature to discuss the fact that petitioner Howell signed the complaint as co-counsel. The matter will not become material until the Court is requested to certify the case as a class action. In respondents' case of *Turoff v. May,* supra, the Court declined to certify class action status because *all* (emphasis: all) attorneys of record were parties plaintiff. In the present case, only one of the attorneys of record is a party plaintiff.

We fail to see any conflict of interest. All lawyers work for pay and there is always the possibility that a lawyer, regardless of which side of the docket he appears upon or regardless of the type of fee arrangement with his client, will put his own personal economic interest above the interest of the client. This is precisely the reason why attorney's fees are regulated in class actions. When the time comes to award attorney's fees, the Court can easily bear in mind the fact that plaintiff Howell is both an attorney and a litigant. In the meantime, we fail to see any conflict, actual or potential.

Of course, there have always been laws prohibiting lawyers from stirring up litigation, e.g., *Art.* 38.12,*TX.Pen.C.* Respondents have quoted *Turoff* as being concerned with "manufactured litigation." Unless the case is affirmatively free of any such aspects, it would be grounds to deny class action status. However, bear in mind that petitioner Howell has been a depositor with respondent since 1963 (P.A.6). Note further that prior to suit, he sought without avail to obtain relief through direct negotiation with the respondent (P.A.9), a requirement of R.23.1, FRCVP (derivative actions) but not a requirement of R.23. Plainly, these uncontroverted allegations have affirmatively discharged the case from any suggestion of "manufactured litigation" which, we submit is the real problem in this area.

In *Garonzik v. Shearson,* supra, the Court denied the existence of a per se rule forbidding an attorney representing himself to be the named plaintiff. There is nothing in the record to indicate that the Court below ever considered the attorney-as-plaintiff question, but if it was considered, it must have been decided on a per se basis because the Courts threw out the case on the basis of pleadings alone. The undersigned attorney, Mr. Pattison, has been present in the case from the outset. If there is no per se rule, then the judgment below must fall because the record shows nothing beyond the fact that Mr. Howell has joined in signing the pleadings.

There is another means for the District Court to meet the problem, if a problem there be. The Court could require that Mr. Howell withdraw if it finds his participation to be prejudicial to the interest of the class. Is this latter approach not more beneficial to the class plaintiffs than the forfeiture of their entire cause of action? Save in connection with

class action litigation, we have never heard it suggested that a litigants' entire position should be forfeit on account of the disqualification of his lawyer. *Supreme v. American,* 441 FS 1064 (NDTX 77) holds that the proper procedure is to require disqualified counsel to withdraw. The logic of such approach is so compelling that we cannot envision rational grounds to deny its application to class actions.

In *Garonzik,* the unnamed members of the plaintiff class paid the ultimate penalty. Their entire cause was forfeit without regard to merit because the Court was not persuaded that the named plaintiff would "adequately" represent their interest. What a gross non sequitur!! In *Roper v. Consurve,* supra, the district court applied similar reasoning and reached the same result, but the Court of Appeals reversed. Why, we ask, did the *Roper* district court not reach the same result as in the *Supreme* district court? It strikes us a bit illogical to declare that wherever the class representation is not thought to be as "adequate" as the court might desire, the proper recourse is to forfeit the claim and give the class nothing.

Professor Kennedy has speculated that some members of the judiciary might possess a significant personal dislike for class actions. Kennedy, *Securities Cases,* 14 Houston LR 769, 801 (77). However, R.23, FRCVP and the class action concept are too well established to even question their value in our scheme of laws. The salutary results secured by class actions over the past thirty years are so widespread that further discussion would be superfluous.

Of course, there have been abuses, but the fact that certain lawyers are unprincipled is hardly news to this Court. There have been numerous other instances of attor-

neys abusing their clients, both before and after the advent of class actions. No one has yet suggested that the proper method of dealing with the problem is to close down the courts. The forfeiture of the class claim is equally repugnant. While there will be instances where such recourse is necessary, the dismissal of the case and the denial to the class of a day in court must be regarded not as the first resort but as the last resort. Simile: *Flaksa v. Little,* 389 F.2d 885 (5-FL 68); *Hassenflu v. Pyke,* 491 F.2d 1094 (5-TX 74). Again, if the case was dismissed on attorney-as-plaintiff grounds, the action was precipitous. The District Court, in the interest of the real plaintiffs, the members of the class should have explored alternatives of a less harsh nature.

Further and finally, petitioners object that respondents have no standing to question the identity of the plaintiffs' lawyer. The claim that the entire class of petitioners should forfeit their cause of action out of respondents' fear that a lawyer who is also a party plaintiff may not "adequately" represent the class is obviously not made out of concern for the welfare of the class. The claim as made is impertinent and arrogant. We think it to be the law (and good law) that one litigant may not question the identity of his opponent's lawyer except on a showing of prejudice to the presentation of the objector's case (e.g., a lawyer consulting with both parties may represent neither). Why, we ask should a different rule be applied in class actions, especially when the demand is not for the withdrawal of opposing counsel but for the forfeiture of the opponent's entire position?

Wherever the courts have questioned the lawyer-as-plaintiff situation in class action cases, we presume that the

question was raised in the interest of the members of the plaintiff class. The courts have desired that the class be better represented. No such altruism can be attributed to respondents. Respondents' only claim has been for forfeiture of the class members' cause of action, no matter how meritorious. The motivation is all too transparent for serious consideration.

The courts should desire that every lawyer, and every class action plaintiff as well, be motivated solely by altruism, ready to pledge to the cause at hand "our Lives, our Fortunes and our sacred Honor," *Dec. Independence.* However, such dedication cannot be expected of mere mortals and the courts, of necessity, must accept less. As in most situations, both inside and outside the law, reasonable adjustments must be made.

We hardly think it conceivable that the adequacy provision of R.23(a)(4) was inserted for the benefit of those called to defend class actions. It follows that respondents have no standing to raise the question *on their own behalf.* (Emphasis) We concede that the court has an affirmative duty to the members of a class, just as the courts have historically had an affirmative obligation to minors, to the mentally infirm and to charitable trusts. However, in discharging this obligation, courts must see to it that the interest of the class is their true lodestar. While the courts may hypothetically desire that each class action plaintiff be a Horatio Alger and each class action attorney be a Clarence Darrow, rigorous application of such standards will pervert a rule for the protection of class members into a recipe for their downfall.

There may be cases where forfeiture of the cause of action is in the best interest of the class members, but there

will be many more where it is better to allow the case to proceed (under close surveillance) even though the relationships do not reach the epitome of desirability. The present case falls in such category. At the minimum, the Court below was entirely too hasty in applying the maximum penalty, on the basis of pleadings alone, without evidentiary hearing, without the development of the facts and without considering available alternatives.

(4) DISMISSAL SHOULD NOT HAVE BEEN GROUNDED ON RULE 11.

Respondents have also invoked R.11, FRCVP "for the reason that the Complaint is a sham" (R.12). Again, there is no indication that the District Court grounded its dismissal on such claim, but it is submitted that it erred if it did so.

Again, respondents have made no attempt to develop their contentions. No affidavits have been submitted and no evidentiary hearing has been requested. One can only speculate as to the particulars of the charge.

Petitioners again cite *Flaksa v. Little,* supra and *Hassenflu v. Pyke,* supra. The recourse of dismissal is only to be invoked as a last resort where any other remedy would be inadequate. No such showing has been made.

(5) DISMISSAL SHOULD NOT HAVE BEEN GROUNDED ON THE ABSTENTION DOCTRINE.

Respondents sought to invoke abstention on a claim that related litigation was pending in the state court (R.12, 13-15, 23-24). However, it appears that any related state case was thereafter dismissed pursuant to respondents' own stipulation (R.51-52).

In support of its plea for abstention, respondent bank has relied on *Dresser v. Ins. Co.,* 358 FS 327 (NDTX 73), but the case is not, strictly speaking, an abstention case at all. That case involves the use of declaratory judgment proceedings in an attempt to circumvent the anti-injunction statute, 28 *USC,* §2283. Petitioners do not attempt to control the outcome of ongoing state court litigation either by injunction or declaratory judgment. The parties plaintiff are not the same. The relief sought is not the same.

Rarely, if ever, is the abstention doctrine applicable to litigation between private parties. Where a litigant comes to the federal court for relief against state and local government and the officers thereof, abstention is often, but not uniformly called for. Even then, unless the federal action seeks to enjoin a criminal prosecution, the proper remedy is a stay of federal court proceedings rather than outright dismissal. *England v. Med. Exrs.,* 375 U.S. 411 (64). If there are any overriding issues of state law which might mandate abstention in this case, respondents have not told us what they are. Petitioners submit that there are none.

Petitioners would emphasize that the dismissal below was "with prejudice" (P.A.17). There is no indication that the Courts below grounded their rulings on the abstention doctrine. We submit that they erred if they did so. Certainly, dismissal "*with prejudice*" is impermissible on such grounds. The entire rationale of abstention is that the Federal Court should stay its hand *until* the state court has spoken. At that time, the litigant is free to renew his federal claim.

In summary, petitioners think that respondents missed the boat. The grounds stated in the motion for dismissal have little or no substance.

The only real question raised by the case is the one presented here as question two: "Do the statutes relating to federal deposit insurance create an implied right of action for the misapplication or purloinment of a federally insured bank deposit?" Such question is not a question as to jurisdiction. The federal courts have ample jurisdiction to construe federal statutes. It is a question of substance. And yet, the District Court's order recites the making of a motion to dismiss on grounds that "the Court lacks jurisdiction over the subject matter of this suit" and states that the motion "be granted" (P.A.17). It appears that the District Court failed to reach the real issue but disposed of the case upon one or more of the superficial ones posited by respondents. The method of handling employed by the Court of Appeals makes it impossible to determine whether or not the affirmance was likewise based upon superficials rather than substance. Inasmuch as the Courts below have failed to come to grips with the real issue in the case, the Supreme Court must either decide that issue in the first instance or remand for further consideration.

CONCLUSION

For the reasons given, a writ of certiorari should issue to review the judgment and decision of the Fifth Circuit.

Respectfully submitted,

HOWARD D. PATTISON
105 S. Prairieville
Athens, Texas 75751
(214) 675-8030

Attorney for Petitioners

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1979

NO. 79- ———

CHARLES BEN HOWELL, SUING ON BEHALF OF HIMSELF AND ALL OTHER PERSONS SIMILARLY SITUATED AS A CLASS ..... *Petitioners*

VS.

METRO BANK OF DALLAS, ET AL ..... *Respondents*

PETITIONERS' APPENDIX

Proceedings In U.S. District Court

U.S. DISTRICT COURT, N.D.TX., DALLAS DIV.; CHARLES BEN HOWELL, SUING ON BEHALF OF HIMSELF AND ALL OTHER PERSONS SIMILARLY SITUATED AS A CLASS V. METRO BANK OF DALLAS AND PAN NATIONAL CORPORATION; NO. CA3-77-1027C

AMENDED COMPLAINT
[Filed October 18, 1977]

JURISDICTION:

1.

This is a class action to recover actual, exemplary and punitive damages amounting to more than one million dollars and to obtain an injunction forbidding the continuance of the unlawful practices shown herein.

2.

The acts, omissions and conduct herein alleged were all organized and carried out by Defendant Pan National Corporation and by the officers and directors of defendant bank as a conspiracy to purloin funds from federally insured bank deposits. The same constitutes a violation of the substantive provisions of 42 *U.S.C.* §1985. The District Courts of the United States have jurisdiction hereof under 28 *U.S.C.* §1343.

3.

The acts, omissions and conduct herein alleged are in violation of the substantive provisions of the Federal Deposit Insurance Act, 12 *U.S.C.*, §§1811-1832 and also 18 *U.S.C.*, §§656, 657, 1005 & 1006. The District Courts of the United States have jurisdiction hereof under 28 *U.S.C.*, §1337.

4.

Plaintiff Howell is a citizen and resident of the State of Texas residing in the City of Dallas, Dallas County, Texas. Plaintiff brings this action as a class action on behalf of all persons similarly situated, estimated at 10,000 persons. It is

impracticable to bring the entire class before the Court. Said persons reside in the State of Texas and elsewhere.

5.

The defendant Metro Bank, is a banking corporation chartered by the State of Texas. Defendant was formerly known as City Bank & Trust Company. Defendant has its principal place of business at Bryan and Bullington Streets, Dallas, Dallas County, Texas. The defendant Pan-National Corporation is a business corporation organized under the laws of Texas. Such defendant has its principal place of business at El Paso, Texas. Such defendant owns, controls and dominates defendant Metro.

6.

This cause of action arose within the territorial boundaries of the United States District Court for the Northern District of Texas, Dallas division.

STATEMENT OF CLAIM:

7.

Defendant bank was originally chartered and has been in business since approximately 1963. From on or about immediately thereafter, up to the present date, defendants have engaged in the following devices and machinations to levy charges against the accounts of plaintiffs. By and through such devices, defendants have siphoned away the deposits of plaintiffs and have purloined the funds and money of plaintiff class unto themselves.

8.

In order to appropriate the funds of plaintiffs, defendants, have devised the so-called "hot check charge." When-

ever checks of plaintiffs have been presented to defendant bank for payment and the plaintiff issuing the check did not have sufficient funds on deposit to immediately pay the check, defendant, without any authority, either in law or any contract or agreement between the parties has levied so-called "hot check charges" against the account of the class plaintiff in question. Such charges amount to as much as $18.00 per item.

9.

In an attempt to justify the said hot check charges, defendant has claimed that it is charging its necessarily incurred direct out-of-pocket expense with regard to returned items. Such claims numerously made through the United States mail were and are false and fraudulent, and were known to be false and fraudulent and constituting mail fraud.

10.

The true facts, at all material times well known to defendant, were and are that defendant has never had any direct out-of-pocket costs necessarily incurred in the handling of returned items over and above the cost of items cleared against available funds. Alternatively, any such extra expense amounts to no more than a few pennies per check.

11.

Each person against whom defendant has ever levied a hot check charge is a member of the class and is a plaintiff hereto. It is alleged that defendant had no basis either in law or agreement of the parties to levy any such charge against any customer at any time. All such charges were and are void.

12.

Defendant was at all times operating under the provisions of the Federal Deposit Insurance Act and all of the deposit accounts involved in this lawsuit were and are insured by the Federal Deposit Insurance Corporation. The nature, amount, mode and method of levying defendant's hot check charges is, in direct violation of the federal deposit insurance statutes aforesaid.

13.

As part and parcel of its scheme to appropriate unto itself the funds of depositors, defendant bank forbid its employees to send out any notices to customers, including plaintiffs, that checks had been returned as insufficient. Plaintiffs, not knowing of the insufficiency continued to write additional checks and defendant continued to appropriate funds from the accounts of plaintiffs under the guise of "hot check" charges.

14.

After the checks of plaintiffs had been bounced and returned, many would be resubmitted by the forwarding banks for payment over and over again. Each time that a check was and is resubmitted, defendant deducts another "hot check" charge from the account of the plaintiff involved.

15.

In numerous instances, the situation snowballed. Some of the checks of plaintiffs would have been sufficient and should have been paid but for the unlawful charges against plaintiffs' accounts. However, defendant bank returned additional checks in these instances and levied additional

"hot check charges" increasing the defendants' unlawful gains even further.

16.

The plantiffs being unaware that their checks had ever been bounced were unable to control the situation and were in a position of helpless peril. Defendant knew of the habits of plaintiffs and other persons similarly situated and of their inability or omission to maintain an accurate record of their checking account balance. Defendant knew of the widespread habit and practice of resubmitting the same check for payment several times.

17.

The deliberate omission by defendant of the giving of prompt notice to plaintiffs that checks written by plaintiffs had been returned for insufficiency was an integral part of the scheme and was false and fraudulent.

STATEMENT OF INDIVIDUAL CLAIM:

18.

The individual claim of plaintiff Howell is here presented as an illustration of the means by which defendant continues to purloin insured funds of its customers including plaintiff Howell who has maintained a checking account with defendant bank since it opened in 1963.

19.

In common with millions of other individual bank depositors, plaintiff maintains a hand posted single entry record of checks and deposits together with a running record of plaintiff's balance on deposit. The record is kept in a "check register" form of booklet furnished by defendant. This record is compared with the statement rendered by defendant at monthly intervals.

20.

On or about July 22, 1975, a statement for the period ending July 15, 1975 was received from defendant listing an indicated balance to plaintiff's credit of $197.53. On July 17, 1975, a deposit notation of $500 was entered on plaintiff's record. However, through oversight, the $500 deposit was not forwarded to defendant bank. By comparing with the bank's statement aforesaid, it was made to appear that plaintiff had a credit balance in excess of $500, but plaintiff's deposit was, in fact, $500 less than indicated by plaintiff's records.

21.

Between July 28, 1975 and August 5, 1975, and within seven (7) business days, defendant bounced 11 checks drawn on plaintiff's account in the total amount of $396.19. Without notice to plaintiff, defendant deducted from plaintiff's account during those seven days, the total of $108.00 in hot check charges. Several of plaintiff's checks would have cleared but for defendant's own charges. Defendant charged $12.00 each for seven checks on the pretext that they had been presented twice. Defendant even charged $6.00 for bouncing a check written by plaintiff for the total amount of $2.02.

22.

Defendant purposely omitted sending any notice to plaintiff that checks were being bounced because it was to defendant's advantage and profit to leave plaintiff in ignorance as long as possible and to snowball the hot check charges to the maximum extent possible. Plaintiff finally

received word from a payee of one of plaintiff's checks. Plaintiff immediately telephoned defendant and demanded a statement of account but it was not forthcoming until August 16, 1975.

23.

The statement of account rendered by defendant reads in words and figures as follows:

METRO Bank OF DALLAS

CHARLES BEN HOWELL
2215 CAMBRIA BLVD
DALLAS TEXAS M MS

ACCOUNT NUMBER 14 2603 0

PERIOD ENDING AUG 11,1975

PAGE NO 1

BALANCE	CHECKS			DEPOSITS	DATE	BALANCE
					15	19753
236	1081				17	18436
2183					22	16253
275					23	15978
4930					24	11048
4845					25	6203
1438	3385				28	1380
6000M					29	780
6000M					30	180
6000M	6000M	6000M			31	162000
6000M	6000M				01	282000
6000M	6000M	6000M	6000M	4700		
6000M	6000M				04	172000
6000M	6000M	6000M	6000M	30000		
6000M	502	1050	2948		06	20780
202	1501				07	19077
5450				20000	11	33627

SUMMARY OF ACTIVITY

AMOUNT	CHECKS NUMBER	CHECKS AMOUNT	ACTIVITY CHARGE	DATE	CURRENT BALANCE
3 54700	32	40826		11	33627

EXPLANATION OF SYMBOLS

RT RETURN ITEM AC ACTIVITY CHARGE IL INSTALLMENT LOAN DEBIT OD OVERDRAFT

24.

On August 19, 1975, plaintiff caused a letter to be sent to defendant bank demanding that the aforesaid charges to his bank account be deleted, reading as follows:

August 19, 1975

Customer Service
Metro Bank
P.O. Box 988
Dallas, Texas 75221

Re: Acct. # 14 2603 0
Charles B. Howell & Patricia A. Howell
Chedding Acct.

Dear Sir:

On July 17, 1975 $500 was put into the mail by this office as a deposit to my account # 14-2603-0.(Or so we thought, it has just come to light that the check was mailed to and posted to another bank account.) I continued to write checks against said sum.

On July 28, your accounting department bounced the first check against my account. In rapid succession over the next eight or nine days, at $6.00 per whack, $108 was posted against my account for NSF checks (Many of the checks running twice). Never once in this period was I given the courtesy of a call or written notice by any of your people that the account was carring a negative balance.

I presume that you would still be bouncing checks and charging me $6.00 each time if one of the persons to whom I had unknowingly issued an NSF check had not called me. I immediately sent money into the account and beginning August 6 or 7 called your office three different times (August 6 or 7, August 11 and August 14) trying to get your bookkeeping department to mail me a current statement so I could find where the error lay. Finally on August 16 the statement arrived. Meantime I sent $700 into the account hoping to alleviate the problem wherever it lay.

I strongly feel that you are treating your customers shabbily when you use this method of doing business--never informing him that his account is being charged over and over again for NSF checks, and then taking 10 days to send him a copy of his statement when he requests it. In all fairness I feel that these check charges of $108, at least in part, should be removed from my account.

Yours very truly,

ph

Patricia Howell

25.

However, in spite of the aforesaid demand, and subsequent demands, defendant has refused to return the charges levied against plaintiff's account.

26.

Included with the defendant's statement of account were 18 separate slips of paper indicating the deduction of hot check charges from plaintiff Howell's account. Each of the slips was in the following form:

DEBIT

CHARLES BEN HOWELL 1426030
AMOUNT 2.02 DATE RETURNED 08-05-75

This charge is made to your account for the cost of handling a check for the amount shown above, which was returned because the balance in your account was not sufficient to pay the check when it was presented. $6.00

METRO BANK OF DALLAS

UNLAWFULNESS OF CHARGES TO THE ENTIRE CLASS:

27.

The aforesaid statement of individual claim is common to the entire class. All other charges to all other members of the class were made in the same manner and in similar amount, all according to a common plan.

28.

Defendant has sent similar charge slips to all members of plaintiff class. Each charge slip was false in that the direct out-of-pocket extra "cost of handling" the insufficient checks of plaintiff Howell was not $108.00 as represented. In truth and in fact, it hardly exceeded $1.08, if at all. Other members of plaintiff class have been similarly gouged. Each charge slip was known to be false. The falsity thereof was material. Defendant made the representations to each member of plaintiff class to induce plaintiff class to rely thereon and thereby submit to defendant's purloining of the funds of plaintiff class. Defendant has secured from its depositors large amounts of money wherein depositors did rely on the aforesaid false representations. Plaintiff Howell and all other class members have sustained detriment in the amount of such void charges plus the earnings thereon. The false representation as to defendant's cost was an integral part of the entire scheme to purloin funds.

29.

The mode, the manner and the amount of defendant's hot check charges to the entire class constitutes a common scheme, plan or device to purloin and wilfully misapply money, funds and credits entrusted to the care of a federally insured bank.

30.

Each of the six dollar entries on the aforesaid statement of account mailed to plaintiff Howell, when read in connection with the accompanying slip entitled "DEBIT", constituted a false entry in any book, report or statement of an insured bank. The same was made for the purpose of securing money, property, profit and benefits to the maker

thereof. Each similar entry and each similar slip presented to each other member of plaintiff class likewise constituted false entries for the same purpose.

31.

Defendant's hot check charges, both as to plaintiff Howell and to all other members of plaintiff class were and are void for each of the following reasons:

(1) No member of plaintiff class has ever knowingly and willingly contracted in advance to pay any such charges after being fully informed as to the relevant facts.

(2) Defendant's hot check charges are exorbitant and unconscionable in amount; being approximately fifty times the actual cost incurred in handling items returned unpaid.

(3) The same were conceived and executed as a device to capitalize upon and realize a profit from innocent mistakes that are endemic to the general public. The device is particularly cruel to persons of limited education and persons unable to maintain a large balance as a cushion against common mistakes.

(4) Defendant knows from its experience in the banking business that a large number of checks are automatically re-presented by the banking system, often two or three times. By levying additional hot check charges when checks are re-presented, defendant is enabled to profit from a single oversight or mistake two or three times over.

(5) The deliberate omission of notice to the depositor is an integral part of the entire scheme. By and through the

omission of notice, defendant is enabled to snowball the number of hot check charges and amplify its profits.

(6) The misrepresentation as to the cost of handling such checks is also an integral part of the scheme. If the true facts were known as to the actual "cost of handling" hot checks, the public outrage would be ungovernable.

32.

After appropriating the funds and money of plaintiffs as aforesaid, defendants employed said funds and money in the operation of their business, including the acquisition of additional banks. Defendant bank's weighted average net rate of return on working assets has been approximately 8% per each 360 day period compounded each 90 days. Such earnings upon the funds of plaintiffs were and are the property of plaintiffs for which plaintiffs should have an accounting.

33.

Plaintiffs estimate the amount appropriated by defendant bank from plaintiffs at $3,000,000. The earnings thereon for which defendants should account amounts to an additional $1,000,000.

34.

The conduct of defendant was willful, wanton, and malicious. Plaintiffs should recover an additional $4,000,000 as exemplary and punitive damages in order to teach defendant a lesson and prevent recurrence of such misconduct.

35.

Defendants are not entitled to invoke the statute of

limitations against plaintiffs for each of the following reasons:

(1) A fiduciary relationship existed between defendant bank and plaintiffs.

(2) Defendant bank advertised and promoted itself as having a reputation for fair dealing and trustworthiness thereby indicating plaintiffs to sleep upon their rights.

(3) Defendant bank being in a position of superior knowledge knew that its conduct was wrongful and misrepresented the nature of the transactions and carefully concealed the true nature and the unlawfulness thereof from plaintiffs for the purpose of defrauding plaintiffs. Plaintiffs commenced this action promptly after the time of determining the true facts, well within the period of limitations.

36.

Plaintiffs should be awarded fair and reasonable attorney's fees for the prosecution of this lawsuit. Considering the nature and complexity of the litigation, the number of clients to be served and the contingency of the recovery, plaintiffs should be awarded fees for their attorneys in an amount not less than $1,000,000.

37.

Plaintiffs further should have injunctive relief to prevent the continuance of defendants' unlawful conduct. Defendants should be enjoined against deducting any fee or charge from any depositor's account without advance authority signed by the party to be charged, specifically enumerating the charges to be deducted. Open ended agreements purportedly giving defendant bank the power

to unilaterally fix or change the amount of its charges should be forbidden. Defendant bank should be forbidden to levy "hot check" charges except insofar as those charges are reasonably related to the actual direct extra cost necessarily incurred by defendant bank. Defendant bank should not be permitted to profit from the mistakes and oversight of its own customers. Defendant's present charges are penal and equity abhors a forfeiture. Defendant should not be allowed to levy any "hot check" charge whatever unless defendant mails notice to the customer on the same day that the customer's check is returned unpaid. Defendant should not be allowed to successively levy numerous charges for bouncing the same check.

38.

Defendants' conduct is alternatively pleaded as a violation of the Texas Deceptive Trade Practice Act of which this Court has pendent jurisdiction. Under the said statute, plaintiffs are entitled to treble damages and attorney's fees.

39.

Defendants' conduct is pleaded in further alternative as constituting fraud and as being an unfair business practice, all under the decisional law of the State of Texas, and also as in violation of the banking laws of Texas.

40.

As a pendent claim, plaintiff Howell would show that he is a professional man and that his reputation and credit are the basis of his livelihood. Defendant both expressly and impliedly contracted and represented to plaintiff Howell that the net amount of money that plaintiff Howell had on deposit with defendant from time to time would be

treated as confidential and would not be divulged to anyone, particularly those with whom plaintiff Howell did business. In violation of this undertaking, defendant bank falsely published and circulated notices to various parties to whom plaintiff Howell had caused to be issued checks drawn upon defendant bank that plaintiff Howell had insufficient funds on deposit with defendant. Such information was false, because if defendant's unlawful deductions from plaintiff's account were added back to plaintiff Howell's account, together with earnings thereon, there would have been sufficient funds on deposit to pay the said check. Such statements to parties presenting checks for payment amounted to the unauthorized disclosure of plaintiff Howell's bank balance entitling plaintiff Howell to recover for invasion of privacy in the amount of $50,000 actual damages and $50,000 exemplary damages.

DEMAND:

WHEREFORE, Plaintiffs demand judgment as follows:

(1) For the recovery and restoration of all unlawful and unjustified charges against the deposit accounts of plaintiffs in the sum of $3,000,000.

(2) For an accounting of the net earnings obtained by defendants upon the money and funds of plaintiffs in the amount of $1,000,000.

(3) For exemplary and punitive damages to plaintiff class in the amount of $4,000,000.

(4) For attorney's fees to plaintiff class in the amount of $1,000,000.

(5) For injunction prohibiting the continuance of defendants' unlawful conduct.

(6) Alternatively, for treble damages under the Texas Deceptive Trade Practices Act in amount of $12,000,000 plus $1,000,000 attorney's fees.

(7) Alternatively, for actual and exemplary damages under the law and decisions of Texas relating to fraud, unfair business practices and the banking business.

(8) For judgment upon plaintiff Howell's pendent cause of action in the amount of $50,000 actual damages and $50,000 exemplary damages.

(9) For the costs of this action.

(10) For all other and further relief in such cases provided. [R. 52-64]

REVISED ORDER OF DISMISSAL

[Caption same as P.A.1; Filed August 7, 1978]

This cause came on for hearing on January 4, 1978, on Defendant's Motion to Dismiss the action because: the Complaint fails to state a claim against the Defendant upon which relief can be granted in that Plaintiff's claim is not subject to prosecution as a class action; the Court lacks jurisdiction because the amount in controversy is less than $10,000, exclusive of interest and costs; and the Court lacks jurisdiction over the subject matter of this suit.

The Court, having heard the argument of Counsel and being fully advised, it is

ORDERED that Defendant's Motion to Dismiss Pursuant to Rule 12 be granted, and that the Complaint be and it is hereby dismissed and that judgment is hereby entered dismissing the action with prejudice with the exception that the court does not pass on the sufficiency of any pendent claims alleged and the same are dismissed without prejudice. The previous order of dismissal is set aside. [R. 67]

Proceedings In The Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

DO NOT PUBLISH

No. 78-2856
Summary Calendar*

CHARLES BEN HOWELL, Suing on behalf of Himself and All Other Persons Similarly Situated as a Class,

Plaintiffs-Appellants,

versus

METRO BANK OF DALLAS, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

(MARCH 20, 1979)

Before AINSWORTH, GODBOLD and VANCE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

Costs are taxed against the plaintiffs-appellants.

*Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

1/See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

ISSUED AS MANDATE:

CLERK'S NOTICE

[Caption as immediately foregoing;
dated April 30, 1979]

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.